
FINAL RECOMMENDATIONS FOR THE OPTOMETRY BOARD

Recommendations of the Department of Consumer Affairs and the Joint Legislative Sunset Review Committee (JLSRC)

ISSUE #1. (CONTINUE REGULATION OF THE PROFESSION?) Should the licensing and regulation of optometrists be continued?

Recommendation #1: *Recommend that profession of optometry continue to be regulated.*

Comments: Due to the highly technical procedures performed by optometrists and the health and safety implications for consumers, the Department and the JLSRC recommend continued regulation of the optometric profession.

ISSUE #2. (CHANGE BOARD COMPOSITION?) Should the composition or membership qualifications of the Board be changed?

Recommendation #2: *There should be two additional public members added to the Board.*

Comments: The Board currently consists of nine members, six professional members and three public members. The majority of the boards under the purview of the Department have a balanced composition with an equitable number of professional and public members. Unlike these other boards, the Board of Optometry has a two-to-one ratio of professional to public members. It has been argued that this professional super majority necessarily results in professional bias, and less focus on consumer protection.

Public participation on regulatory boards ensures a balanced approach to decision-making, and enhances public protection. In recent years, the JLSRC has expanded the number of public members on DCA regulatory boards. Public members have been added to the Accountancy, Contractors, Pharmacy, Podiatry, Psychology, Respiratory Care, and Veterinary Medical Boards through sunset review legislation.¹

If the Board is sustained, the Department and the JLSRC recommend adding two additional public members, appointed by the Governor, for a total of eleven members (six professional, five public). This new composition would provide more consumer representation while continuing to maintain the

¹ SB 133 (Chapter 718, Statutes of 2001), SB 2029 (Chapter 1005, Statutes of 2000), SB 827 (Chapter 759, Statutes of 1997), SB 1981 (Chapter 736, Statutes of 1998), SB 1983 (Chapter 589, Statutes of 1998), SB 827 (Chapter 759, Statutes of 1997), respectively.

expertise needed for technical regulatory and enforcement issues. Two additional Board members would not substantially increase a Board's operational costs.²

ISSUE #3: (RESOLVE CONFLICTS BETWEEN PROFESSIONAL AND PUBLIC MEMBERS?) What actions should the Board take to resolve some of the ongoing problems between professional members and public members?

Recommendation #3: *The Board needs to continue its efforts to reconcile conflicts between professional and public members.*

Comments: As reported to the Department and the JLSRC and detailed in the “Minority Report”, the Board's public members argue that they are treated differently than the professional members, suggesting the potential for a two-tiered approach by the Board staff in addressing the concerns of the public members.

As evidenced by the sunset review “minority report” submitted to the JLSRC by the Board's public members (who constitute one-half of the Board), significant conflict exists between the professional and public members of the Board of Optometry. Further evidence of this conflict is the Board's inability to meet due to the unwillingness of the public members to attend meetings under current conditions. Although the Board has been making disciplinary decisions via mail ballot, the inability of Board leadership to address and resolve the issues precipitating the impasse is a matter of concern. The absence of Board meetings undermines the purpose of the Board—which in part is to engage in regular public discourse.

This impasse and consistent inability to resolve differences is unprecedented. The Department has been asked on more than one occasion to facilitate conversations between the Board's two factions so that a Board meeting may be convened. The Department believes that this is the responsibility of Board leadership – its presiding chair and executive officer. Nonetheless, the Department has provided guidance and recommendations on how to overcome the intransigency of the Board members.

It was recommended that professional facilitators or conflict mediation experts be brought in to resolve the conflict so that the Board can carry out its business. While the Department was encouraged by the Board's recent decision to do so, it is disappointed by the plan engaged to effectuate conflict mediation. The Department's profound concerns about Board leadership remain.

ISSUE #4: (COMPLY WITH RECENT AUDIT?) What corrective steps should the Board take to comply with deficiencies found during a recent audit conducted by the Department of Finance?

Recommendation #4: *The Board should comply with corrective steps recommended in the Board's recent audit.*

Comments: The Department and JLSRC recommend that the Board continue to take the corrective steps needed to comply with the Board's recent audit, conducted by the Department of Finance (DOF).

² Average annual travel and per diem costs per member are approximately \$2,500.

At the request of the Department, the DOF, through an interagency agreement, conducted an audit review of the Board's internal fiscal controls. The DOF's draft audit identified several areas needing improvement. These included the need to submit monthly bank statements on a timely basis and process purchase invoices in a timely manner, among others. The Board agreed with the audit findings and recommendations for remedial behavior in its response to the DOF. The Department would like to underscore the importance of these corrective steps and the need to have sound internal fiscal controls in place prior to the next sunset review cycle.

ISSUE #5: (RELEASE CONTACT LENS PRESCRIPTIONS UPON REQUEST?) Should optometrists be required to release contact lens prescriptions upon request of the patient?

Recommendation #5: *The Board should proceed immediately with regulations to require optometrists to release contact lens prescriptions upon request of their patient, and if unsuccessful, then the Legislature should take the necessary action to assure contact lens prescriptions are provided upon request.*

Comments: According to Federal Trade Commission rules dating back to the 1970s, optometrists and ophthalmologists are not required to give patients contact lens prescriptions. However, since 1992, optometrists have been required to release eyeglass prescriptions to patients. Although many optometrists practicing in California do release contact lens prescriptions, they are not required to do so. Consumers face a disadvantage in the marketplace if they are unable to shop competitively for contact lenses. If prescriptions are provided, consumers are well served. The Board staff has prepared language for a rulemaking proposal that would require optometrists to release contact lens prescriptions to patients, upon request.³ However, Board staff has not yet started the rulemaking process, because the Board has not met to approve the proposal. This is yet another example of the Board's inaction and the impact on consumers. The Department and JLSRC recommend approval of this proposal. If that is not possible, the Department and JLSRC recommend the Legislature take action on behalf of consumers and require the release of contact lens prescriptions upon request.

ISSUE #6: (DEVELOP STANDARDS FOR UNLICENSED ASSISTANTS?) Should the Board adopt supervision and training standards for unlicensed optometric assistants?

Recommendation #6: *The Board should conduct an occupational analysis for optometric assistants to identify the tasks they will perform, and the attendant training and skill level required. An occupational analysis should be developed before unlicensed assistants are permitted to engage in practices that until now required licensure as an optometrist. Following the occupational analysis, regulations clarifying the level of training and supervision of assistants should be promulgated.*

³ Twenty-seven other states in the nation already require the release of a contact lens prescription upon request: Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Texas, Vermont, Virginia, Washington, and Wyoming. (July 2001) Nebraska and Utah require the prescriber automatically provide the prescription, unless specified conditions exist, which include the patient's failure to pay for the examination visit.

Comments: Senate Bill 929 (Chapter 676, Statutes of 2000) expanded the scope of practice for optometrists and expanded the duties that an unlicensed assistant may perform under the direct responsibility and supervision of an optometrist. This is a dramatic change in the delivery of optometric services. The provisions of SB 929 reclassified technicians, who previously were only authorized to fit contact lenses, to assistants who can perform various testing procedures including glaucoma testing, visual perception testing, measurement of the thickness of the cornea, screening of the corneal curvature, administering topical agents, and performing sonograms to measure the length of the eye and structures of the eye, generally used for surgical procedures and may involve direct contact with the eye. Clearly, this is a significant expansion of the tasks that unlicensed assistants were able to perform prior to the passage of SB 929, and consumers should not be placed at risk until duties of these assistants are clarified and regulations are adopted clarifying the level of training and supervision. Specifically, the Board needs to establish standards to ensure that unlicensed assistants demonstrate adequate knowledge and skill. In the absence of clarifying regulations, individual practitioners in the field could interpret the law in a variety of ways. To protect consumers, the Board should expedite the adoption of clarifying regulations.

Additional Joint Committee Recommendations

ISSUE #7: (CONTINUE WITH THE CURRENT BOARD?) Should the profession of optometry continue to be regulated by the current Board, or should the Board be reconstituted, or become a bureau under the Department of Consumer Affairs?

Recommendation #7: *The current membership of the Board should be allowed to sunset.*

Comments: Since the last sunset review this Board has struggled with scope of practice issues, criticism of its enforcement efforts, an impasse between Board members that has effectively rendered the Board impotent, and a persistent perception that the profession exercises inordinate control of the Board. The Department's Deputy Director for Board Relations was called in to mediate Board Member conflict and facilitated the Board's September meeting. In 1999 the Director intervened in a Board dispute with the Department of Justice which has severely impaired the Board's relationship with the Department of Justice's licensing division. The Department is troubled by the lack of leadership exhibited at the Board and has shared those concerns with Board Members and the Executive Officer.

Following criticism that the Board was unlawfully permitting optometric exams to be conducted by unlicensed assistant personnel, the Board originally responded that this was common practice, and there was no intention to discipline optometrists delegating this function. When the Department suggested legislation to review this practice, the Board indicated previous legislative efforts had not been successful, and legislation would not be pursued to clarify the permission of this practice. Nonetheless, and fully aware of the Department's interest in resolving the matter, the optometry scope of practice bill, Senate Bill 929 (Chapter 676, Statutes of 2000), was amended late in the session to permit unlicensed assistant personnel to perform optometric exams. While this may well be an appropriate contemporization of the practice act, it was achieved with virtually no public discussion, and without even cursory notification to the Department.

In 2001, the Department worked with the Board and the Office of Examination Resources (OER) to evaluate the national exam and its appropriateness for use in California. However, the Board did not conduct an independent audit of the national exam, in spite of the significant changes in their scope of practice that occurred as a result of SB 929, until the Department intervened.